



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Clement International Corporation
File: B-255304.2
Date: April 5, 1994

Marc F. Efron, Esq., and James C. Minnis, Esq., Crowell & Moring, for the protester.
Rand L. Allen, Esq., and Paul F. Khoury, Esq., Wiley, Rein & Fielding, for Research Triangle Institute, an interested party.
Michael Colvin, Department of Health and Human Services, for the agency.
Daniel I. Gordon, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that awardee should have been excluded from competition due to conflict of interest is denied where there is no indication that the awardee played any role in the preparation of the solicitation or specifications, had access to the protester's proprietary information, or was involved in the evaluation of the protester's performance under another contract.
2. Protest alleging that the source selection authority lacked a reasonable basis to reject the technical evaluators' finding that the protester's technical proposal was superior to the awardee's is denied where the source selection authority's contemporaneous written explanation set forth her grounds for disagreeing with the evaluators' conclusions and her explanation has a reasonable basis and is consistent with the solicitation evaluation criteria.
3. Cost realism analysis is reasonable where it addressed the realism of the relevant aspects of the offerors' cost proposals and provided assurance that proposal with low proposed cost was likely to provide significantly lower cost than competing proposal.

DECISION

Clement International Corporation protests the award of a contract to Research Triangle Institute (RTI) under request for proposals (RFP) No. 200-93-0606(P), issued by

the Centers for Disease Control and Prevention, Department of Health and Human Services (HHS), for support services needed in the agency's preparation of toxicological profiles concerning hazardous substances. Clement contends that the award to RTI was improper because: (1) RTI enjoyed an unfair competitive advantage; (2) the source selection authority lacked a reasonable basis to reject the technical evaluators' finding that Clement's proposal was superior to RTI's; and (3) the agency failed to analyze the realism of RTI's proposed costs.

We deny the protest.

The RFP, issued on May 14, 1993, anticipated award of a 5-year cost-plus-award-fee contract. The RFP stated that the agency estimated that 30 toxicological profiles (or updates to existing profiles) would be needed each year, and that the evaluated cost for each proposal would be calculated by applying the offeror's proposed labor hours and labor rates to that quantity of profiles.

The RFP identified the technical criteria, and the weight assigned to each (out of a total of 100 technical points), as follows:

Technical approach and program management plan	35
Understanding of the problem and statement of work	25
Personnel qualifications and utilization	15
Company experience and capability	15
Facilities and equipment	10

The RFP stated that, in proposal evaluation, the agency would assign "paramount consideration" to technical proposals, but that the "degree of importance of price or cost as an evaluation factor will increase with the degree of equality among the technical proposals."

Three timely proposals were received, one of which was evaluated as technically unacceptable and therefore eliminated from the competitive range. The two remaining proposals were submitted by Clement and RTI; Clement was the incumbent under the predecessor contract. In the initial

evaluation, while the technical evaluation panel (TEP) found both proposals technically acceptable, it concluded that Clement's proposal was "clearly technically superior" to RTI's. That conclusion was supported by the difference in point scores assigned (97 vs. 81) as well as by a narrative discussion of each proposal's strengths and weaknesses.

The agency conducted discussions with the offerors and then requested best and final offers (BAFO). The TEP evaluated the revised proposals and adjusted the ratings accordingly. The point score disparity was somewhat reduced (98 points for Clement's BAFO and 85 points for RTI's), but the TEP again concluded that Clement's technical proposal was clearly superior to RTI's. In response to a request from the contracting officer (who also served as the source selection authority) that the TEP identify specific information about the advantages and disadvantages of each offeror "with respect to the technical/cost differences," the TEP provided a narrative evaluation which specified the weaknesses that the TEP had found in RTI's proposal and the strengths identified in Clement's.

The contracting officer disagreed with the TEP's conclusions. She found that there was not "clear and convincing evidence" that Clement's proposal was superior to RTI's. She determined that the "major advantage" the TEP had found in Clement's proposal was that company's superior experience, which she attributed to Clement's status as the incumbent. She discounted that advantage because the TEP had noted that RTI had extensive experience performing work in areas of similar technical complexity and because "company experience and capability" was assigned only 15 percent of the overall technical score in the RFP.

The contracting officer also rejected the finding in the TEP's BAFO evaluation that RTI lacked an understanding of the toxicological profile development process. Her contemporaneous written explanation of her rejection of that finding stated that it was inconsistent with the TEP's initial evaluation, which had lauded various aspects of RTI's proposal. She also wrote that it was not supported by RTI's proposal, which she found illustrated the offeror's technical competence and provided assurance that the company did understand the complexity of the profile development process.

Based on her review of the proposals and her consideration of the TEP evaluation, the contracting officer concluded that the two proposals were "essentially equal." Accordingly, she determined that cost would be the deciding

factor in selecting the awardee. Because RTI's evaluated cost was significantly (more than 25 percent) lower than Clement's, she selected RTI for award of the contract.

Clement raises three protest grounds, and we address each in turn. First, Clement contends that RTI enjoyed an unfair competitive advantage which rendered it ineligible for award. This contention is based on various suppositions and inferences that Clement makes based on the fact that RTI, as part of its work under another HHS contract, performed part of an evaluation of the agency's toxicological profile program. Clement suggests that work under that contract could have led RTI to learn about Clement's strengths and weaknesses in the performance of its contract (which, as noted earlier, is the predecessor to the one at issue in this protest). Clement also alleges that RTI's work provided it unique insights into the agency's "special requirements" under this procurement. Finally, Clement argues that RTI should have been excluded from the competition under this procurement because permitting it to compete would create a conflict of interest, since RTI was competing with Clement here, while evaluating Clement's performance under the predecessor contract as part of RTI's own contract.

An agency may exclude an offeror from a procurement where it finds a conflict of interest or impropriety which could affect the award process. NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. However, a determination that an impropriety is likely to occur must be based on facts and not mere innuendo or suspicion. Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. Relevant provisions of the Federal Acquisition Regulation (FAR), set forth in FAR Subpart 9.5, are intended to avoid the possibility of bias in situations where a contractor would be in a position to favor its own capabilities, and to avoid the possibility that a contractor, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. See Person-Sys. Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546.

Here, nothing in the record suggests that RTI gained access to any information which could call into question the propriety of RTI's participation in this procurement. RTI's work was performed under a subcontract to a government contractor, and there is no indication--and Clement does not allege--that the work provided RTI access to Clement's proprietary information. CF. FAR § 9.505-4 (where a

contractor obtains other companies' proprietary information, restrictions are imposed upon the contractor's use of that information). Moreover, PTI played no role in the preparation of the RFP or its specifications in this procurement. Cf. FAR § 9.505-2 (where a firm prepared specifications, a conflict may exist as to any procurement using those specifications, and the firm is generally barred from competing for such a procurement).

Clement points to an alleged competitive advantage gained through RTI's review of Clement's performance and RTI's learning of the agency's requirements in the procurement at issue here. We see no indication that any such advantage accrued to RTI. RTI's subcontract work was extremely limited, with a total value of less than \$85,000. The bulk of the work involved conducting focus groups with lay persons living near hazardous waste sites and with technical and clinical users to assess the usefulness of toxicological profiles. None of the work involved evaluation of Clement's performance under the predecessor contract, and there is no reason to believe that RTI's work provided that company with nonpublic information about the agency's requirements in this procurement--certainly not information that could have provided a competitive advantage over the incumbent, Clement.

Because of RTI's lack of access to information proprietary to Clement and its lack of involvement in either the agency's evaluation of Clement's contract performance or the conduct of this procurement, we conclude that there was no conflict requiring the exclusion of RTI from this procurement.

Clement's second ground of protest challenges the contracting officer's determination that the two competing proposals were essentially technically equal. Clement argues that the contracting officer lacked a reasonable basis to reject the TEP's finding that Clement's proposal was clearly superior technically to RTI's.

In reviewing an agency's source selection decision, we will examine the evaluation supporting that decision to ensure that the evaluation was reasonable and consistent with the stated evaluation criteria. Contel Fed. Sys., 71 Comp. Gen. 11 (1991), 91-2 CPD ¶ 325. The source selection official, however, is not bound by the recommendation of lower-level evaluators, Verify, Inc., 71 Comp. Gen. 158 (1992), 92-1 CPD ¶ 107; accordingly, in determining whether the award decision was reasonable and consistent with the solicitation evaluation criteria, we review the evaluation, not of lower-level evaluators, but of the source selection authority. Id.

Consequently, the question here is not whether the TEP was justified in finding Clement's proposal superior to RTI's, but, rather, whether the contracting officer, who was the source selection authority, could properly find the two proposals technically equal. We conclude that she could.

There is no dispute that both proposals were technically acceptable; instead, the dispute concerns the weaknesses which the TEP identified in RTI's BAFO proposal-- particularly, of course, the weaknesses which the TEP found distinguished the two proposals. Specifically, the TEP, in its report, found that RTI, although it had "extensive experience in performing work in areas of similar technical complexity," did not have specific experience in developing toxicological profiles. In addition, the TEP inferred, based on RTI's failure to provide specific profile development tasks with associated milestones and time frames, that the company lacked "an understanding of the profile development process." Finally, the TEP concluded that RTI's failure in its BAFO to provide adequate clarification of its quality assurance and quality control (QA/QC) procedures meant that the proposal did not "provide the specific details necessary to ensure the development of a quality document."

The contracting officer reviewed this TEP report as well as RTI's proposal. She concluded that the lack of experience in developing toxicological profiles was simply the result of RTI's not being the incumbent; she noted that Clement was similarly lacking in such experience before it began performance of the predecessor contract. Accordingly, and in light of the TEP's finding that RTI had extensive experience in performing work in areas of similar technical complexity, the contracting officer determined that the two offerors' experience should be treated as essentially equal.

In reviewing her determination on this issue, we note that the RFP did not require experience in developing toxicological profiles; it simply directed offerors to present their experience in conducting "similar or related projects" and "projects of a similar nature." The contracting officer's decision to consider RTI's experience, even though not in the essentially unique area of performance in this procurement, was thus consistent with the RFP. It also appears reasonable, since excluding from consideration experience not gained in developing toxicological profiles would effectively guarantee that only the incumbent could score well under this factor. We therefore conclude that the contracting officer's decision to consider the two offerors' experience as essentially equal was reasonable and consistent with the RFP.

The contracting officer viewed RTI's lack of experience in developing toxicological profiles as the major reason that the TEP found Clement's proposal superior. Apparently for that reason, her written analysis only briefly addressed the other weaknesses identified by the TEP. Thus, she did not provide an in-depth analysis to the criticism, raised by the TEP, that RTI failed to identify specific profile development tasks with associated milestones and time frames. Although the TEP concluded, based on that failure, that RTI did not understand the profile development process, the contracting officer disagreed. Based on her review of RTI's proposal, she apparently saw the lack of detail in this area as a marginal matter; she noted that the TEP itself had written, in its initial evaluation, that RTI had a good understanding of the work to be performed. Our review of the record indicates that her conclusion that RTI's proposal demonstrated an understanding of the profile development process was a reasonable exercise of her discretion, notwithstanding the TEP's differing opinion (which itself was not supported by in-depth explanation or analysis).

Similarly, the contracting officer did not accept the TEP's concern about RTI's discussion of the QA/QC process. While her contemporaneous written analysis did not specifically address the QA/QC issue, the record demonstrates that she did consider the TEP's findings, and obviously did not consider the TEP's concern over this issue to be a significant one. This conclusion appears reasonable in light of the fact that QA/QC constituted only one of eight areas under the technical approach/program management plan factor, and the fact that the TEP's criticism appeared to concern not RTI's proposed QA/QC procedures themselves, but rather the brevity of the proposal's discussion of this area.

Under the circumstances, we find that the contracting officer had a reasonable basis, consistent with the RFP evaluation criteria, to find that RTI's and Clement's proposals were essentially equal technically. That being so, award was properly made on the basis of cost, notwithstanding that the evaluation criteria assigned cost less importance than technical considerations.¹ Prospect Assocs. Ltd., B-249047, Oct. 20, 1992, 92-2 CPD ¶ 258.

¹Because the contracting officer determined that the two proposals were technically equal, no cost/technical tradeoff was performed. In view of the substantial difference in cost, however, it plainly would have been reasonable and consistent with the RFP for the agency to have selected RTI's significantly less costly proposal, even if Clement's proposal were found to have a limited technical advantage.

Clement's final protest ground concerns the agency's cost evaluation: Clement contends that the agency failed to conduct an adequate cost realism analysis. Clement points out that RTI's proposal is based on that company's performing tasks with significantly fewer labor hours than were used by Clement under the predecessor contract or were anticipated in the agency's independent estimate. Clement argues that, without an adequate cost realism analysis, the agency cannot know whether those claimed savings will actually be realized.

In making an award determination for a cost-reimbursement contract, a contracting agency must perform a cost realism analysis of competing proposals, since the government is required to pay the contractor its actual allowable cost. FAR §§ 15.605(d), 15.801, 15.805. That analysis requires the exercise of informed judgment by the contracting agency, which is in the best position to assess the realism of cost and technical approaches. Prospect Assocs. Ltd., supra. For that reason, and because the agency will have to bear the additional expenses and other adverse results of a defective cost analysis, our review is limited to a determination of whether the agency cost evaluation was reasonable and not arbitrary. Id.

The two relevant aspects of the cost realism analysis here are the realism of the labor rates proposed by RTI and the realism of the number of labor hours RTI proposed to perform the contract tasks. Clement does not suggest that RTI's proposed labor rates are unrealistic, and the record includes documentation demonstrating that the agency analyzed the realism of those rates. Clement focuses instead on the second aspect, the question of whether RTI proposed an unrealistically low number of labor hours to perform the effort. The contemporaneous record demonstrates that the evaluators specifically considered this question and satisfied themselves that the low cost in RTI's proposal was not illusory and that that proposal was thus likely to provide significantly lower cost than Clement's competing proposal. For example, the TEP wrote that RTI's proposed "[p]ersonnel and estimates of time appear adequate for the various categories." In addition, for one specific area, the TEP voiced concern that RTI's proposed number of labor hours was excessive. It is thus clear that the TEP considered the realism of the number of labor hours proposed for RTI as well as for other offerors.² The fact that the TEP did not write a separate report addressing this issue does not mean that no cost realism analysis was conducted. See Allied-Signal Aerospace Co., Bendix Communications Div.,

²For example, the proposal of the third offeror was found not to include adequate labor hours for certain tasks.

B-249214.4, Jan. 29, 1993, 93-1 CPD § 109. Similarly, the fact that Clement may disagree with the agency's judgment in this regard is not a basis for our Office to find that judgment unreasonable.

The protest is denied.

Robert P. Murphy
Robert P. Murphy
Acting General Counsel